



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT CHUKA

ENVIRONMENT AND LAND CASE (OS) NO. 15 OF 2019

JOSEPH KIBAARA M'ICUGA.....APPLICANT

VERSUS

M'CHABARI KINORO.....RESPONDENT

JUDGEMENT

1. The Applicant filed an originating summons dated **30th April 2019** and filed on **10th July, 2019** seeking for orders that: -

i. M'CHABARI KINORO (Hereinafter called the Respondent being the registered proprietor of all that parcel of land known as KAJUKI/KAMUTIRIA/810 (Hereinafter referred to as the "suit land") and measuring about 7.25 Ha or thereabout his registration of part of the suit land measuring about Two (2) Acres be deemed and be declared to have been extinguished through adverse possession of the Applicant upon the said part of the suit land.

ii. The Applicant JOSEPH KIBAARA M'ICUGA be declared and be registered as the absolute proprietor of TWO (2) Acres to be excised from the said suit property.

iii. An order directing the THARAKA/NITHI County Surveyor and the Land Registrar to survey the suit property and register respectively the Applicant JOSEPH KIBAARA M'ICUGA as the absolute proprietor of TWO (2) Acres to be excised from the suit property known as KAJUKI/KAMUTIRIA/810 which measures 7.25 Ha or thereabout.

iv. The cost of this Application be borne by the Respondent.

2. The application is supported by the evidence and facts set out in the Affidavit of Joseph KIBAARA M' ICUGA, the Applicant herein, and on the following grounds: -

a. That the Applicant has been in actual occupation and possession of part of the suit land measuring TWO (2) Acres or thereabout for the last seventy (70) Years or so and before the Respondent got registered as the proprietor.

b. That the Applicant has been enjoying quiet, peaceful, exclusive and uninterrupted occupation and possession of TWO (2) Acres comprised in the suit land for a period of Seventy (70) Years which is a period exceeding TWELVE (12) YEARS since his occupation and possession.

c. THAT even before registration of the Respondent as the Title holder of the suit property on or about the 28th November, 2014, the Applicant was still openly in occupation and possession of TWO (2) Acres comprised in the suit land which occupation and possession started way back in the year 1942 when his father was still alive.

d. THAT the TWO (2) Acres now in occupation and possession by the Applicant is clearly and well-marked by boundaries and seasonal river which separates the TWO (2) Acres from the Respondent's other larger piece of land.

e. THAT the Applicant's mother was buried on these TWO (2) Acres of land well marked and demarcated as a foresaid.

f. THAT in any event, the Respondent obtained the Title to the suit land including the TWO (2) Acres fraudulently and without disclosing material facts that the Applicant was in occupation and possession and that the TWO (2) Acres were not vacant and available for registration in the Respondent's names.

APPLICANT' S CASE

3. JOSEPH KIBAARA M'ICUGA the Applicant in his supporting affidavit states that he has been in occupation and possession of part of that parcel of land comprised in Title No. KAJUKI/KAMUTIRIA/810 currently registered in the names of M'CHABARI KINORO. He has annexed thereto a copy of the Green card of the suit property and the official search. The Applicant contends that the entire suit land measures about 7.25 Ha or thereabout as shown in the said Green card and Official Search and registered as aforesaid.
4. The applicant avers that the portion of the suit property that he occupies and that he possesses measures about TWO (2) Acres or thereabout and that he has been in occupation and possession of the said TWO (2) Acres comprised in the entire suit land for seventy (70) Years. That his occupation and possession of the TWO (2) Acres or thereabout has been peaceful, exclusive, uninterrupted and conspicuously open to all and sundry. That the entire community and the members of the locality knows and have known him as the owner of the portion of land that he occupies and which portion measures about TWO (2) Acres or thereabout.
5. The applicant avers that he was born and has been living on the said portion of land for a period of about seventy (70) Years without any interruption which is a period in excess of Twelve (12) Years. That even before the Respondent got registered as the proprietor of the entire suit land on the 28th November,2014, he was still and had been in open and conspicuous occupation and possession of the TWO (2) Acres comprised in the suit property for over seventy (70) Years. He states that even his late mother was buried on the part of these TWO (2) Acres of land and nobody raised eyebrows.
6. The applicant further contends that the said TWO (2) Acres of land that he occupies is well and clearly marked by boundary features and one seasonal river which clearly separates the TWO (2) Acres of land from the rest of the larger land belonging to the Respondent.
7. The applicant further avers that the respondent obtained the Title to the entire suit land including the TWO (2) Acres fraudulently and without disclosing material facts that the Applicant was actually in occupation of part of the same and that the TWO (2) Acres were not vacant and available for registration in the names of the Respondent. He further explains that even the original map clearly shows that the Respondent's land does not cross over the seasonal River and therefore the acquisition of the Two Acres which are on the other side of the seasonal river was obviously fraudulent and nondisclosure of material facts.
8. The applicant avers that his residential houses are still on the Two Acres of land comprised in the suit property and that he has been cultivating the same portion peacefully, exclusively and uninterrupted since he was born.
9. The applicant contends that the Respondent was fully aware that he was in occupation of the said Two acres comprised in the suit land even before the registration but he deliberately failed to disclose this fact to the Land Registrar and therefore obtained the Title fraudulently by concealing material facts. That after the registration of Title to the Respondent on the 28th of November,2014, the Respondent has never come to claim ownership of the Two (2) Acres now occupied by the applicant and no action has ever been taken by the Respondent or any person to claim ownership and or possession of the Two (2) Acres of the suit land because the respondent knows that the suit land does not belong to him.
10. The applicant avers that the Respondent has never at any time settled, utilized or built on the TWO Acres of land comprised in the suit property aforesaid. That he has been utilizing the Two (2) Acres of the suit land without any permission from the Respondent or any of his family members. That he has been using the suit land since time immemorial and that this was the only piece of land that he depends on for his livelihood.
11. He contends that in view of the foregoing facts, it is in the interest of justice that the registration of the two (2) acres of land comprised in Title No. KAJUKI/KAMUTIRIA/810 be cancelled and the Applicant be registered as the lawful and absolute proprietor thereof after excision.
12. At the hearing Joseph Kibaara M'Icuga the Applicant testified as PW1. He was cross-examined and re-examined. He stated that he stays at Kajuki and is a farmer. He further stated that parcel No. Kajuki/Kamutiria/810 was his land that was left to him by his father. That he occupies 2 acres which he has occupied for over 70 years since he was born in 1947. PW1 testified that he cultivates, rears livestock and lives on the said 2 acres of land. He stated that there is a boundary separating his land with the land belonging to the Respondent and that there is a rivulet in between. The Applicant stated that his mother was buried on the said land. He adopted the averments in his supporting affidavit and urged the court to grant him the orders sought.
13. On cross examination by Mr. Guntai for the respondent, the Applicant stated that he did not have any identification documents and also claimed he did not have any document to authenticate that he was born in 1947. He however maintained that he was born in 1947 and was over 70 years of age. He stated that the land he was claiming was left to him by his father though he did not have any copies of succession proceeding because they did not file a succession cause.
14. The Applicant stated that adjudication process took place in 2005 and the land was awarded to him by the Adjudication committee. However, he did not have any adjudication proceedings and did not file those proceedings. He stated that he got a title of land to parcel No. Kajuki/Kamutiria/810 and the title to the land is in his name and was 2 acres. When Mr. Guntai questioned PW1 as to the document in the list of documents and the same were read to him, he confirmed that LR. No. Kajuki/Kamutiria/810 is registered in the names of M'Chabari Kinoro the Respondent herein and is 7.25 Ha in size.
15. When Respondent's advocate questioned the Applicant if the land is about 18 acres and whether he is claiming the whole of it, his response was that he did not know how the land measures since he is illiterate. He stated that his father left the land to him and that Plot No. 810 belongs to the respondent but that the Respondent has intruded into his two acres. When Mr. Guntai asked him why a few minutes earlier he had said that the parcel 810 is registered in his name, the Applicant's response was that he did not understand the question. He was also questioned about his claim that the respondent fraudulently obtained the land and whether he reported the same to the police, and his

answer was that he did not report.

16. When asked when he discovered that he was fraudulently dispossessed, the Applicant stated that he discovered it in the year 2019 and also stated that his advocate was handling the case and did not understand about particularizing the particulars of fraud. He also stated that he did not have documents to support those particulars. When asked whether his claim is for adverse possession or for cancellation of title so that he can be issued with a title for 2 acres as the title was fraudulently obtained, the Applicant's response was that his claim was that his land was fraudulently taken from him and it was not necessarily for adverse possession.

17. The Applicant was also questioned whether he was aware that a claim for adverse possession could not be conflated with a claim for fraudulent acquisition, his response was that he did not know and stated that he did not have any other land. Counsel for the respondent referred the Applicant to the respondent's list of documents, in particular document 2, and the Applicant confirmed that his name is JOSEPH KIBAARA M'ICUGA and when asked if the certificate of search shows that parcel No. Kajuki/Kamutiria/793 is in his name, he stated that parcel No.793 is solely his.

18. When Mr. Guntai informed the Applicant that he had earlier stated that he did not have any land but later admitted that he did have and was perjuring himself, PW1 responded that he did not understand what the advocate was saying. The Applicant confirmed that plot No. 793 was his land and that he had other land which he gave to his children. When asked if he has any other land apart from what he had given to his children, his response was that he has Kajuki/Kamutiria/1522 which is quite far. When asked if they are the only parcels registered in his name, he stated that he only had Plot Nos. 793 and 1522 registered in his name.

19. When further questioned on Document No. 2 which indicates that parcel No. Kajuki/Kamutiria/813 is in the name of Joseph Kibaara M'icugu and is measuring 1.15 hectares, PW1 response was that he did not know about that land but added that he had seen it belongs to his sons and it is registered in his name. The Respondent's Counsel further asked PW1 whether he was aware that he had perjured himself 3 times and his response was that he was not cheating and that he will not continue to lie to court. The respondent's advocate finally asked the Applicant whether he had any other parcels of land except the ones already mentioned and the response was that he did not have any other land. He was asked if he owned Kajuki/Kamutiria/2859 and the Applicant's response was that he did not have such land. The certificate for Kamutiria /2859 was read to him and he further stated that he did not know the land was registered in his name and stated that the land was not his and that it was the first time he was hearing that the land was his.

20. The Applicant stated that the search was a fake document and that even if the court searches by itself and finds that the land is in his name, the same would be false. He was asked to confirm to court that he owns other lands and that he subdivided the same to his sons and the Applicant's answer was in the affirmative, adding he had enough land and that is why he shared to his sons. When asked if he was aware about the photographs annexed to his affidavit marked JKM3 in the supporting affidavit, his response was that he did not know about the photographs and that it was his advocate Mr. Bwonwonga who took them. He was further asked if he was willing to call his advocate as a witness to authenticate the photographs and PW1 confirmed that he would. Mr. Guntai put to the Applicant that the photos support the respondent's case that PW1 invaded the land in 2018, cut trees and caused wastage on the same and which incident was reported at Chuka police station OB. No.19/19/09/2018 and which further was confirmed in the report by the Sub-County Forestry officer in a report dated 26/9/2018, PW1 response was that he did not cut trees or invade any person's land.

21. PW2 was EDWARD KAUMUTHU KANG'ANG'I. He stated that he lives in Kilimanjari and is a mason and knows both the applicant and respondent who are his neighbours back at home. He contends that he recorded his witness statement dated 23/9/2019. He stated that he knows the parcel of land L.R. KAJUKI/KAMUTIRIA/810. That the title deed is in the name of CHABARI MUKAO M'CHABARI KINORO also known as CHABARI MUKAO.

22. His evidence was that JOSEPH KIBAARA has lived on 2 acres of that land for over 40 years. That he is farming and has developed it and that his mother was buried thereon. He stated that there is also a boundary and there in between is a river. PW2 stated that the respondent has never settled on the said two acres and that nobody has disturbed the Applicant for over twelve years.

23. When cross examined by Mr. Guntai, PW2 stated that he did not know the title number of the suit land. He stated that the Applicant is over 60 years and was born and brought up on that land. PW2 stated that he was born in Kamutiria and has lived there all through. He further stated that Adjudication was done in that area in the year 2005 and was not aware if any complaint was made to the Adjudication committee.

24. PW2 stated that the Applicant and the Respondent began disputing over the land 3 years ago and added that he did not know when title deeds were issued in Kamutiria. He stated that the Applicant and the Respondent are neighbours and share a boundary. That the respondent did not have any other land. When shown the Respondent's documents filed on 25.1. 2021, PW2 confirmed that the search marked MK2 is in the name of JOSEPH KIBAARA but added that he does not know his land, but that he has no other land. PW2 stated that he is not aware of plot No. 813. He also stated that he does not know plot No.2859. He stated that the applicant's father bequeathed him the suit land. He further stated that Joseph Kibaara M'ikuga is the one who subdivided land to his sons and gave plot No.2154 to Daniel. He stated that he knows Zakayo Nthengi Kibaara who is a son to Joseph Kibaara and who was given land by his father, though he did not know the acreage. He also stated that he knows JOHN NJERU KIBAARA, the son of JOSEPH KIBAARA who was given land plot 2153 by his father. He confirmed that it is true that Joseph Kibaara had subdivided land to his sons and has left some for himself but PW2 stated that he did not know the size he left for himself. He stated that he knows that L.R Kamutiria /810 belongs to Chabari Kinoro and the applicant is claiming 2 acres. When he was re-examined, PW2 stated that he has never heard of any dispute between the applicant and the Respondent and that Joseph Kibaara is aged 70 years and has lived on the 2 acres for 40 years. He stated that Erick Mutuma Kibaara is the grandson of Joseph Kibaara.

25. PW3 was JOHN NJERU. He testified that he lives in Kajuki and does menial jobs. He stated that he knows the Applicant and the Respondent Joseph Kibaara who is his father and that they are his neighbours. He adopted his statement dated 23/9/2021 and stated that he knows L.R Kajuki /Kamutiria/810 belongs to the respondent but the applicant stays in some 2 acres thereon. He also reiterated that the applicant is tilling the same and always lived there and that he buried his mother on the land. PW3 was also cross-examined and re-examined. He confirmed that he and his brothers were given parcels of land by their father after he subdivided his land which measured 8.74 hectares.

26. The applicant filed his submissions dated 17th November 2021 on 19th of October, 2021 and relied on the case of *Regina Wanjiru Mwago & Another and Lucy Wirimu Gichuhi & 2 others Muranga ELC No.9 of 2018 (OS)* where the court held that adverse possession can only be claimed against a properly registered owner that is to say the possession must be adverse to that of the registered proprietor. The Applicant has also relied on the case of *Kasuve versus Mwaani Investment Limited & Others 1 KLR* where the Court of Appeal restated what a Plaintiff in a claim for Adverse possession has to prove and held as follows;

“In order to be entitled to land by Adverse possession, the claimant must prove that he has been in exclusive possession of the Land openly and as of right without interruption for a period of 12 years either dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

27. In his submissions the Applicant has also quoted *Civil Appeal No.24 of 1979 between Githu versus Ndeete (1984) KLR* in which the Court of Appeal quoted Section 38 of the Limitation of Actions Act which states:

“1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

2. An order made under subsection (i) shall on registration take effect subject to any entry on the register which has not been extinguished.”

28. The Applicant submitted that in view of the foregoing factual and legal analysis it is his submissions that he has proved his case to the required standards and the court should find in his favour.

THE RESPONDENT’S CASE

29. On the 15th of January 2021 the respondent filed a Replying Affidavit sworn by himself on 14th January 2021. The respondent contends that the application was entirely devoid of merit, a non- starter and an entire abuse of the Court process. He avers that he is the registered owner of Land Parcel known as Kajuki/Kamutiria/810 measuring approximately 7.25 ha which was allocated to him by the Adjudication Committee, a fact he stated was well within the knowledge of the Applicant herein. He annexed and marked as MK1 a copy of the title deed.

30. The respondent avers that he has lived on the land all his life and it is where he has built his homestead and raised his 16 children. That he also farms and rears cattle and other domestic animals on the same land and has planted trees on parts of the land. He acknowledges to know the applicant and states that he is his neighbour, having inherited the land which was owned by M’Icuga M’Mutea (deceased) who was his father and that the land now comprising parcel Nos. Kajuki/Kamutiria/793, 808, 813, 2152, 2154, 2155, 2156, 2658 and 2859 all measuring approximately 8.7 Ha which are next to the respondent’s land. He states that Joseph Kibaara M’icuga was the original heir to the said land, where the respondent has known the applicant to have resided since he was born to date.

31. The respondent states that the applicant has at no time in his life occupied, resided, or used any part of his land. That the applicant has his homestead within the land comprising parcels Nos. Kajuki/ Kamutiria/ 793, 808, 813, 2152, 2153, 2154, 2155, 2156, 2858 and 2859 which land he inherited from his father. That the Applicant is relatively close to age as the respondent 2nd son, and was only about 6 years old when the respondent’s 2nd son was born and he can therefore not claim that he has lived on his land for over 70 years when the applicant is not even 70 years of age yet. He avers that the Applicant has subdivided the said inherited land and allocated parts of it to his sons. That he has further sold parts of his land to at least two (2) known persons namely, Paul Ephantus Mugendi and Mukwaiti Kajiita. The respondent avers that the Applicant has retained Parcel No. Kajuki/Kamutiria/793, 813 and 2859 making a total acreage of 3.57 Ha. He has annexed certificates of search marked MK2.

32. The respondent further avers that the Land parcels were allocated to them by the Adjudication Committee and each concerned party was given the portions which they have lived on and developed and that if at all the Applicant had or was occupying any part of his land during that time the Adjudication Committee was allocating land, they would have allocated the land to him. That the Applicant is blatantly lying to this Honourable court about occupying the respondent’s land. He states that in fact the Applicant invaded the Respondent’s land sometimes in 2017 where he cut down the trees which the respondent had planted, and the damages were assessed by the Kenya Forest Services who forwarded the same to the applicant. The Respondent has annexed and marked MK3 a copy of the damages assessed by the Kenya Forest services. That further and to avoid any unbecoming eventuality the respondent and his son reported the issue to the police at Chuka Police Station under OB/19/14/2/2018 and a police officer by the name, Shadrack Wambua was assigned the role of Investigating Officer by the OCS. That the said Police Officer went looking for the suspect but for months the Applicant could not be found. That Mr. Wambua was later transferred and the issue was handed over to an officer by the name Corporal Kandie.

33. The respondent avers that the Applicant later resurfaced and indicated that the portion measuring two acres was his and not part of the respondent’s land. That this is the portion the applicant now claims to have lived on and this being an issue of boundaries, they decided to visit the Chuka Registrar’s office who referred them to the District Surveyor’s office for clarification, and the District Surveyor advised them to wait for a day to enable him visit the scene once he gets the Map sheet to the Land from the head office. The respondent states that he asked his son to inform the area chief of what was happening as he is the leader of the village. That the area chief called both of them to the scene and came with a copy of the Map on his phone which was sent to the applicant by the Chief Registrar Chuka and they were all present and saw the map and what was said and were able to clarify the boundary after which he decided to fence the land to avoid any further conflicts.

34. The Respondent avers that a registered surveyor (one Daniel Chabari) was appointed to mark the boundary and the respondent informed the Applicant of the intended marking of the boundary through a letter from P.M. Mutani and Co. Advocates. That on the appointed day,

which was on 13/10/2017, the surveyor arrived and summoned the chairman of the Adjudication Committee which was adjudicating over the Kajuki/Kamutiria Adjudication Section, one Mr. M'Thiora. That when all was set, the Applicant refused the undertaking of the process claiming the owner of the land (808) was in Zambia. The respondent annexed and marked the letter marked as MK4. That the respondent decided to investigate and find out who owns the land only to find that it was owned by one of the Applicant's sons, one John Njeru Kibaara who the respondent did not know until that specific day. That sometimes later the Applicant invaded his land again and started burning trees and he reported to the police again and was issued yet another OB Number.

35. The respondent avers that later on the Area Chief and the Applicant informed the respondent that there was a surveyor sent from the District Surveyor's Office who was going to settle the dispute and they were required to pay Kshs.5,000 each for the exercise. That they paid the same and the said surveyor showed them the map. That the said map was completely different from the map he knew and the one the chief showed them. That he questioned the same and the surveyor indicated that someone was playing a tricky game. He annexed maps to the land marked "MK" a and "b" respectively.

36. The respondent avers that he asked his son to investigate further and find out what was happening. That they wrote to the Director of surveys and visited their Nairobi office where they confirmed the map was as it was originally with no alterations done. That he decided to report the matter to the DCIO so he could investigate the issue since that amounted to forgery. That he was issued another OB to that effect being OB No.20 of 11/02/19 and one Mr. Joseph Ole Nampaso was assigned the role to investigate how and who altered the boundary.

37. The respondent contends that he recalls that sometimes during the hearing of the Adjudication Committee Appeal No.33 of 2005, the Applicant appeared before the committee and in his witness statement he stated before the Committee that he lived on the contested suit land being land parcel no. Kajuki/Kamutiria/815 for 62 years. He has annexed proceedings marked MK6. That he was surprised that the Applicant states that he has buried his mother on his land yet the community attended the funeral and he was aware of the same and if at all she was buried on his land he would have known as he would have seen people on his land. The respondent avers that it is factual that the mother to the applicant was buried on the Applicant's land where other members of his family members are buried.

38. The Respondent avers that when he was applying to the Registrar for title to his land, he was not obliged to inform the Applicant as it was his land the same way the Applicant was not obliged to inform him what he did with his land. That in fact there is no river on his land and the only source of water in the form of a river is in the other side of the Applicant's actual land which is where they have always sourced water from. That even the neighbouring land owners go through the Applicant's land in order to get to the river and not respondent's land. The respondent alleges that the applicant is dishonest. That the Applicant conveniently refused, failed and/or neglected to inform the court that the applicant's land being the immediate neighbour to his land and that the applicant was present during Adjudication, the Applicant was given the land that his father lived on and has never lived on the respondent's land.

39. The respondent states that it is quite illogical for the Applicant to claim to have lived on his land when he has land next to his and further that he was living on his father's land where he grew up and so there is no way he has lived on the respondent's land for over seventy years unless he was trying to insinuate that his parents also lived on the respondent's land. That the Applicant is also being untruthful when he states that he has lived on the respondent's land for over 70 years when the same had not even been demarcated. That in fact, the place used to be bushy and most of them moved there later, and that 70 years ago the Applicant had not even been born.

40. The respondent avers that equity demands that those who seek equity must come to equity with clean hands and that the Applicant has clearly not done so as he has cleverly omitted to mention the fact that his family has another parcel of land where they also reside and cultivate. That it is trite maxim of equity that equity aids the vigilant and not the indolent and the Applicant herein is per exemplar of an indolent litigant who is trying to acquire land through the back door, the same land he intends to share to his children, when he has land and has even gone ahead to share land amongst his sons.

41. The respondent avers that the Applicant has adduced no proof of the allegations of having resided on the suit land for 70 years and the same remains a mere untested allegation. That the Applicant's averment remains mere hearsay and of no probative value. That the Applicant's claim has not met the stipulated requirements to qualify for the prayers sought as the applicant has never stayed on the suit land at any point in his life time. That the upshot of the foregoing is that the suit and Application herein is incompetent, defective and an abuse of the court process as the same discloses no known cause of action. He therefore prays that the originating summons be dismissed with cost.

42. On evidence the respondent testified as DW1 and stated that plot No.Kajuki /Kamutiria/810 is his land and that he has lived on that land since 1942. He stated that it is where he was born and his father also lived thereon. He stated that he knew the Applicant, Joseph Kibaara, adding that his father belongs to their family. That they live together and have lived together since 1949 when the applicant was born. He adopted his witness statement dated 14/1/2021 together with the annexures as his evidence-in-chief. He produced the documents annexed as exhibits. He also adopted the contents of the replying affidavit filed as part of his evidence and also produced the documents annexed to the said Replying Affidavit as exhibits.

43. The Respondent stated that the suit land was his and it is about 10 acres but not sure of the exact acreage. There are some certificate of official searches that he has produced as exhibits. The searches are for plot Nos. 793,813,2859. He stated that he did not know the owners of plot No. 793,813,2859,2155, 2154. He stated that these parcels have no connection with the case before court. Among the documents the Respondent produced is a ruling by the District Land Adjudication in the further list of Documents. They related to plot No.945. He stated that he did not know that Plot number but in his statement he has stated that the Applicant's parent owned land next to his and they live in the same village. DW1 stated that he has never had a case with the Applicant. He stated that there was a time he called the Adjudication committee, one Mr. Muthiora who came. That he had also called the District Surveyor, One Ken but did not record his statement. He stated that he knows the mother of Joseph Kibaara. That she died but the Respondent did not attend her burial since he was away. He stated that he knew she was buried in the land belonging to the Applicant. He stated that he knows since the grave is there and can be seen. DW1 stated that there is no stream running through plot No.810.He stated that he had fenced plot No.810, but the fence is no longer there. That there is no time they went to the lands office, but he invited the District surveyor to come and identify their boundary.

44. He stated that the Applicant is claiming 2 acres from his land. He stated that there is nobody living/staying on the 2 acres. He stated that he went to the police and reported the matter because the Applicant had entered onto his land and recorded a statement. On re-examination

by Mr. Guntai the respondent stated that the applicant is his immediate neighbour and they share a boundary and even when the Adjudication was done, the parcels were adjacent to each other. That during adjudication, the Applicant did not raise any dispute with the Adjudication committee over the disputed land. That at the time the Applicant was born, his father was neighbouring the Respondent's father and they are still neighbours and he knows where the Applicant's mother was buried and he stated that he could even show the court the grave. He stated that she was buried on the land of the Applicant's father. He reiterated that she was not buried on his land, but on her husband's land.

45. The Respondent stated that he called the surveyor and the Adjudication committee because the Applicant had cut trees on his land. He stated that that was about 3 years ago when the applicant cut the trees, and that there were neighbours and that he reported to the forest office. He stated that the Applicant's land was big, although he could not tell the acreage, but reiterated that it is bigger than his. He stated that he cannot give the Applicant land when he has land that he has subdivided to his children and does not know why the Applicant is claiming his 2 acres yet he has his own land.

46. The respondent called three witnesses. DW2 was AUGUSTINE MUGAMBI MUGAOH who adopted his witness statement dated 14/1/2021. He stated that he works in Nairobi but his home is in Tharaka Nithi County and that he knows the respondent and was aware of the matter before court. On cross examination by Mr. Bwonwonga DW2 stated that the Applicant is their neighbour. He denies that the Applicant has lived on the suit land and stated that the dispute arose in or around August 2017 when the Applicant encroached on the suit land, and cut down trees, a matter that was reported to the police. His evidence was that the Applicant was living on his father's land. That the registered owner of parcel No. Kajuki/Kamutiria/810 is the Respondent who is his father.

47. DW2 reiterated that a dispute arose in or about 2017 when Mr. Joseph Kibaara the plaintiff encroached on the Respondent's parcel of land. That the respondent tried to resolve the same by reporting the encroachment to the area chief. He avers that the matter before court is over a different issue, adverse possession.

48. He stated that the Applicant cut the Respondent's trees and burnt them and the matter is pending at the police as the applicant has not been arrested. That Joseph Kibaara owns plot No.793,813 & 2829. He avers that they border Mr. Joseph Kibaara's son's land, plot No. 808. He stated that there is no river between their land and that of Joseph Kibaara. He stated that he knows about plot Kanjuki/Kamutiria/945 which belongs to M'CHABARI KINORO.

49. DW3 was FRANCIS GITONGA NYAMU. He adopted his witness statement dated 14/1/2021 and filed in court on 15/1/2021 as his evidence in Chief. On cross examination by Mr. Bwonwonga he stated that he was born in 1978 and therefore cannot tell what took place before 1978. He stated that he knows the Applicant's land but cannot remember the plot number. He stated that he lives on plot 811 and he knows Joseph Kibaara who was his Catechist and teacher. He avers that there is a dispute over the boundary and there is no river between them.

50. DW4 was Mr. Kiria Njeru Muriungu. He stated that he lives in Kirima Nkari in Kamutiria and contends that he knows both Joseph Kibaara and M'CHABARI KINORO. He adopted his witness statement as his evidence-in- chief. He stated that he knew Joseph Kibaara since 1954. That he has also known M'CHABARI KINORO since 1954 when he was born. That the Respondent is his neighbour but he did not know if he knows how to read and write. He stated that the Applicant's land borders that of the Respondent. That there is a small valley between them. He stated that he knew the Applicant's mother and that he did not attend her burial but stated she was buried in the land of JOSEPH KIBAARA. He added that River Thuci is very far from the suit land.

51. In his submissions filed on 25th November, 2021, the Respondent submitted that the Applicant has not adduced any evidence that shows that he has been in occupation of the suit land at all, let alone for 12 years. The Respondent relied on the case of *Symon Gatutu Kimamo & 587 Others –vs- East African Portland Cement Co. Ltd [2015] eKLR; Kireyu –vs- Omutut (1990) KLR 709; John Imbaiza Vodoye –vs- Ann Chebet & Another [2017] eKLR; Situma –vs- Cherono (Civil Appeal No. 351 of 2002); M'Mbaoni M'Thaara –vs- James Mbaka [2017] eKLR; Sarah Nyambua Kuufu –vs- David Njuguna Civil Appeal No. 20 of 1998 and Malcom Bell vs- Danie Toroitich Arap Moi & Ano [2012] eKLR*. It is the Respondent's contention that he is the true and actual owner of the suit land having been allocated the same by the adjudication committee and that he has been in possession and occupation of the same since then. That the Applicant owns his own land right next to the Respondent's land where he has lived since he was a young boy having inherited the same from his father. That the Applicant has gone ahead to pass on the land to his sons and left some portions for himself. It is the Respondent's submission that the Applicant's claim is not merited and the same ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

52. This court has carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. The court identifies the following issues for determination:

- i. Whether the Applicant has acquired 2 acres out of Parcel No. Kajuki/Kamutiria/810 through adverse possession.
- ii. Whether the Applicant is entitled to the reliefs sought.

53. In deciding whether or not the Applicant has proved his claim for adverse possession to the required standard in Civil Cases, the Applicant must prove that he has been in occupation of the suit land measuring 2 acres for a period of over twelve (12) years; that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse i.e inconsistent with the right of the registered owner.

54. In *Wambugu –vs- Njuguna (1983) KLR 173*, the Court of Appeal restated the principles for adverse possession and held as follows:

“1. The general principle is that until the contrary is proved, possession in law follows the right to possess.

2. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The Respondent could and did not prove that the Appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years to enable him, the Respondent, to title to that land by adverse possession.

3. The Limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been disposed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

55. In the case of *Mtana Lewa –vs- Kahindi Mwangandi* [2015] eKLR, the *Court of Appeal (Makhandia JA)* stated as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

56. The doctrine of adverse possession is embodied in section 7 of the Limitation of Actions Act which provides:

“An Action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

57. Section 13 of the same Act further makes provision for adverse possession as follows:

“(1)A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes possession of the land.

2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.”

55. Section 38(1) of the Limitation of Actions Act provides that:

“(1)Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

59. In the instant case, there is no dispute that land parcel number Kajuki/Kamutiria/810 measuring about 7.25 hectares is registered in the name of the Respondent. A copy of the title deed, the Green Card and the certificate of official search of the said property which were produced as exhibits indicate that the land was first registered in the Respondent’s name on **28th November, 2014** and title deed issued to him on the same date. The Applicant’s case is that he has been occupying and living on two (2) acres forming part of the said parcel comprised in Title Number Kajuki/Kamutiria/810 for over twelve years. The Applicant filed this suit on **10th July, 2019**. From the year 2014 when the Respondent was first registered as proprietor of the land until 2019, is a period of only about five (5) years. Based on the threshold set out for adverse possession, and especially the prerequisite period of twelve (12) years, I am not convinced that on a balance of probabilities the Applicant has proved his case for adverse possession. The Applicant could and did not prove that the Respondent had either been dispossessed or had discontinued possession of the suit land measuring two (2) acres for a continued statutory period of twelve years. A close consideration of the evidence on record reveals that the title held by the Respondent had not even exceeded twelve (12) years from the time the same was registered in his name. The Applicant cannot purport to have in possession adverse to the Respondent for the requisite period of twelve (12) years when the evidence on record reveals that the title held by the Respondent had not even exceeded six years from the time the same was registered in his name on **28th November, 2014**, while this suit was filed on **10th July, 2019**. Moreover, the Applicant also failed to adduce any evidence to support his alleged occupation and use of the suit property. Whereas the Applicant alleges that he is living on the land and carrying out farming thereon and even that his mother was buried thereon, there was no evidence adduced before court to support the same. It is trite law that he who alleges must prove.

60. The Applicant has also alleged that the Respondent has acquired the suit land fraudulently.

61. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in *Bullen & leake & Jacobs*, Precedent of Pleadings 13th Edition quoting with approval the cases of *Wallingford Mutual Society* (1880)5 1 LLOYD, S Rep. 305, 308, *Lawrence v Lord Norreys* (1880) 15 App. Case 210 at 221 and *Davy v Garrett* (1878) 7 ch.D. 473 at 489 it is stated that:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings and

though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulently conduct must be distinctly alleged and as distinctly alleged and as distinctly proved. General allegations, however strong may be words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”

62. Similarly, in the *case of Ndolo –vs- Ndolo (2008) eKLR* the court held that:

“The Plaintiffs have also pleaded fraud against the Defendant. It is trite law that any allegations of fraud must be pleaded and strictly proved.”

63. In this instant case the applicant has alleged fraud but the same has not been particularized or even proved. The same has also not been specifically pleaded. There are mere assertions without evidence.

64. The case of *R.G. Patel vs Lalji Mjakani* cited in the case of *Gladys Wanjiru Ngacha s Theresa Chepsaat & 4 Others (2013) eKLR* where the Court of Appeal held that:

“allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence”

65. In the case of *Dr. Joseph Arap Ngok vs Justice Moiwo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997*, the court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law take precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

66. Section 26 of the Land Registration Act is categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the certificate of title has been acquired fraudulently, unprocedurally or through corrupt scheme.

67. The Respondent is the registered owner of parcel Kajuki/Kamtiria/810 and no evidence has been tabled by the applicant to demonstrate that there was any fraud in his acquisition of the property. Further, the court finds that the Applicant’s evidence was contradictory. For example he maintained that he had no other land besides the suit land, but the evidence on record showed that he had other parcels, including one that he subdivided amongst his children.

68. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I am not satisfied that the Applicant has proved his case on a balance of probabilities. It is my finding that the Applicant has failed to bring himself within the limits of the doctrine of adverse possession.

69. Consequently, the Applicant’s claim is without merit and must fail. The same is dismissed. The costs of the suit shall be in favour of the Respondent against the Applicant.

70. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF DECEMBER, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Gachuki h/b for Guantai for Respondent

N/A for Bwononga for Applicant

C. K. YANO,

JUDGE